(3)

Supreme Court, U.S.
FILED
MAY 18 1994
THE CLERK

No. 93-1570

IN THE
Supreme Court of the United States
October Term, 1993

PREFERRED COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER & POWER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF UNITED STATES TELEPHONE ASSOCIATION AND BELL ATLANTIC CORPORATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MARY MCDERMOTT
900 19th Street, N.W., Ste. 800
Washington, D.C. 20006
(202) 326-7247
Counsel for United States Telephone Association

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JAMES R. YOUNG
JOHN THORNE
MICHAEL E. GLOVER
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-0895
Counsel for Bell Atlantic Corp.

May 18, 1994

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

84 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . . 1

REASONS FOR GRANTING THE WRIT 5

I. THIS CASE OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE FIRST AMENDMENT PRINCIPLES APPLICABLE TO ADMINISTRATIVE SCHEMES THAT LICENSE THE DEPLOYMENT OF FACILITIES NECESSARY FOR ELECTRONIC SPEECH 5

II. THIS CASE ALSO PROVIDES A VALUABLE OPPORTUNITY TO DECIDE WHETHER THE FIRST AMENDMENT PERMITS MUNICIPALITIES TO SILENCE SPEECH AND REDUCE COMPETITION BY GRANTING EXCLUSIVE CABLE FRANCHISES 12

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Pages**

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) 17
Chesapeake & Potomac Telephone Co. of Virginia v. United States, 830 F. Supp. 909 (E.D. Va. 1993) 1
Chicago Cable Communications v. Chicago Cable Comm'n, 678 F. Supp. 734 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1540 (7th Cir. 1989) 10
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 5, 7
City of Ladue v. Gilleo, No. 92-1856 4
City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) 5-8
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 1-2
Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 14
Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986) (*per curiam*), *aff'd*, 480 U.S. 926 (1987) . 14
Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 17
Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633 (M.D. Ga. 1991), *remanded on other grounds*, 992 F.2d 1178 (11th Cir. 1993) 13
Dolan v. Tigard, No. 93-518 8
Edenfield v. Fane, 113 S. Ct. 1792 (1993) 16
Erie Telecommunications, Inc. v. Erie, 659 F. Supp. 580 (W.D. Pa. 1987) 9
FCC v. Florida Power Corp., 480 U.S. 245 (1987) 17
Forsyth Cty. v. Nationalist Movement, 112 S.Ct. 2395 (1992) 3, 6
Freedman v. Maryland, 380 U.S. 51 (1965) 7
FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 6, 7
Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987) 13
Jones Intercable of San Diego, Inc. v. City of Lake Elsinore, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991) 13
Kovacs v. Cooper, 336 U.S. 77 (1949) 5
Kunz v. New York, 340 U.S. 290 (1951) 6
Leathers v. Medlock, 499 U.S. 439 (1991) 1, 9

TABLE OF AUTHORITIES (cont.)

Cases	Pages
Lee v. International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) (*per curiam*)	4
McCullough v. Maryland, 4 Wheat. 316 (1819)	9
Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)	11, 14
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)	5
Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	17
Niemotko v. Maryland, 340 U.S. 268 (1951)	3
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	8
Omega Satellite Products v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982)	14
Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986)	16
Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 430 (1991)	18
Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)	17
Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986)	13
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)	14
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	14
Riley v. National Federation of the Blind, Inc., 487 U.S. 781 (1988)	8
Saia v. New York, 334 U.S. 558 (1948)	5
Schneider v. State, 308 U.S. 147 (1939)	4, 5
Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)	6
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	6
Southwestern Bell Tel. Co. v. FCC, Nos. 91-1416, *et al.* (D.C. Cir. Apr. 5, 1994)	17
Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987)	15
Turner Broadcasting System, Inc. v. FCC, Nos. 93-44/93-45	2
United States v. O'Brien, 391 U.S. 367 (1968)	10, 16

TABLE OF AUTHORITIES (cont.)

Cases	Pages
Vance v. Universal Amusement Co., 445 U.S. 308 (1980)	8
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	6, 16
Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990)	18

Statutes, Rules and Constitutional Provisions	Pages
U.S. Constitution, First Amendment	*passim*
47 U.S.C. § 214	12
47 U.S.C. § 224	17
47 U.S.C. § 301	12
47 U.S.C. § 309	12
47 U.S.C. § 531	9
47 U.S.C. § 541	8, 9, 18
47 U.S.C. § 542	9
47 U.S.C. § 544	9
1992 Cable Act, 106 Stat. 1460, § 2(a)	15

Miscellaneous	Pages
Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States 1992*, (112th ed. 1992)	14
J. Emord, *Freedom, Technology, and the First Amendment* (1991)	11
Office of Plans and Policies, Federal Communications Comm'n, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26 (June 1990)	14
Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867 (1983)	10
L. Levy, *Emergence of a Free Press* (1985)	11
Newspaper Ass'n of America, *Facts About Newspapers '92*, (1992)	14
Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program 16 (April 28, 1992)	15-16
Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 Catholic L. Rev. 671 (1986)	11
F. Siebert, *Freedom of the Press in England: 1476-1776* (1965)	11

INTEREST OF *AMICI CURIAE*[*]

Amici curiae Bell Atlantic Corporation and the United States Telephone Association submit this brief in support of both the petition for *certiorari* filed by Preferred Communications, Inc. and the cross-petition filed by the City of Los Angeles.

Bell Atlantic provides telecommunications services and products to the general public, including the carriage of voice, data, and video services over its local telephone network subject to regulation as a common carrier under state laws and the federal Communications Act of 1934. In addition, Bell Atlantic recently prevailed in a constitutional challenge to 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video programming" directly to subscribers within their telephone service areas. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *appeal pending*, Nos. 93-2340, 93-2341 (4th Cir.) (filed Oct. 15, 1993). Therefore, Bell Atlantic is an electronic speaker in its own right, as well as a transporter of the voice, video, data, and graphics messages of others.

The United States Telephone Association is a membership corporation of over eleven hundred domestic local exchange telephone companies. The association's members provide over 98% of the local telephone access lines in the United States. Bell Atlantic, for example, is a member of the United States Telephone Association.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already made clear that video programming is constitutionally protected expression. *See Leathers v. Medlock*, 499 U.S. 439, ___, 111 S. Ct. 1438, 1442 (1991); *City of Los Angeles v. Preferred*

---

[*] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

Communications, Inc., 476 U.S. 488, 494 (1986). This case gives the Court the opportunity to clarify how the First Amendment applies to speakers who use facilities along public streets and rights of way to distribute information in electronic rather than printed form.

In *Turner Broadcasting System, Inc. v. FCC*, Nos. 93-44, 93-45, this Court is considering the constitutionality of the "must-carry" rules contained in 47 U.S.C. §§ 534 and 535, which require cable operators to transmit the programming of commercial and noncommercial broadcast stations over their cable systems. The instant case is a logical successor to *Turner*. It provides an opportunity to apply the First Amendment principles governing electronic speech to a different array of regulatory activities: rules restricting the deployment of facilities necessary to communicate information from speakers to listeners.

There is enormous controversy regarding the power of municipalities to impose conditions on, and otherwise to regulate, the deployment of cable facilities. Lower courts are divided over the proper First Amendment standard for regulations of cable television and other emerging forms of electronic communication. The instant case is a microcosm illustrating the need for this Court's review: the case began in 1983, has persisted for over a decade, and has already been the subject of one plenary proceeding in this Court. Yet Preferred Communications is still seeking the government permit that will enable it to speak to its chosen audience. The questions presented here will not go away. The need for this Court's guidance will only increase. And the constitutional issues raised by this case have already been thoroughly aired in many lower courts and are fully ripe for this Court's review.

I. The Court should grant the petition for *certiorari* filed by Preferred Communications in order to clarify the constitutional standards that apply to the distribution of electronic speech. In particular, the Court should clarify that

three fundamental First Amendment principles developed in the context of the distribution of print and other types of speech should govern the distribution of information in electronic form:

(1) Schemes providing for the administrative regulation of speech must contain "'narrowly drawn, reasonable and definite standards'" to constrain the decisionmaker's discretion. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402 (1992) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

(2) Such schemes must include reasonable time limits within which the decisionmaker is required to act.

(3) Any restriction on the deployment of facilities used for electronic speech must be both narrowly tailored to the Government's regulatory objective and possess an essential nexus to the particular facilities in question.

The importance of articulating these principles is underscored by the First Amendment abuses that are reflected in the record of this case and that are a common characteristic of the procedures by which local governments grant cable franchises. The franchise process routinely imposes virtually no limits on the discretion of local government officials and no meaningful time limits for action. The result is that cable operators can obtain the permits they need to speak only if they accept onerous conditions that are wholly unrelated to any legitimate governmental interest. Common examples of these conditions range from providing free services and facilities for the use of local governments to providing local officials a special channel over which they can transmit their own chosen messages to voters — an information-age equivalent of the franking privilege.

Moreover, this type of standardless administrative control of protected expression is not limited to cable television. For example, the FCC has asserted authority to regulate telephone company facilities used to deliver video speech as required by

"public convenience and necessity." Satellite technologies used to distribute video programming are subject to a similar standard. The breadth of this problem makes the need for this Court's review all the more acute.

II. The Court should also grant the cross-petition filed by the City of Los Angeles in order to establish, once and for all, that the First Amendment does not permit municipalities to grant exclusive franchises to incumbent cable companies. This Court's review is necessary because the lower courts are divided over the question, although the weight of authority would hold that the First Amendment prevents municipalities from banning a second speaker. While the 1992 Cable Act limited the power of local officials to grant exclusive franchises, it did not solve the problem — as illustrated by Los Angeles' refusal to consider another application for a cable franchise until the intervention of the Ninth Circuit.

Moreover, this Court's review is essential, because the speech at issue is video programming — the most pervasive form of communication in America today and the contemporary equivalent of the handbill, newspaper, and live entertainment source rolled into one. This Court should make clear that regulations impairing the practical ability of speakers and audiences to participate fully in such an important medium properly trigger the most searching constitutional scrutiny. *See City of Ladue v. Gilleo*, No. 92-1856 (argued Feb. 23, 1994); *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992) (*per curiam*); *Schneider v. State*, 308 U.S. 147, 162 (1939). The justifications proffered by the City of Los Angeles and other municipalities are woefully inadequate to warrant a ban on competing speakers.

REASONS FOR GRANTING THE WRIT

I. THIS CASE OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE FIRST AMENDMENT PRINCIPLES APPLICABLE TO ADMINISTRATIVE SCHEMES THAT LICENSE THE DEPLOYMENT OF FACILITIES NECESSARY FOR ELECTRONIC SPEECH

This Court has always subjected to full First Amendment scrutiny laws that deprive speakers of the channels of communication they need to deliver their messages to their chosen audiences.[1] This Court should do no less with respect to cable television and other forms of electronic speech. The wires and cables that carry electronic information are the arteries of expression, without which speakers could not communicate with willing listeners.

To be sure, we do not maintain that Government is completely disabled from regulating the deployment of the facilities necessary to transmit electronic speech — any more than the Government is wholly disabled from regulating the movement of sound trucks on public streets,[2] the placement

---

[1] For example, this Court has applied First Amendment scrutiny to laws regulating publishers' ability to distribute their newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("use tax" on cost of paper and ink products consumed in publishing process); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (regulation of newsracks); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (same); to laws prohibiting the use of loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); and to laws regulating the physical distribution of handbills. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

[2] *See Kovacs v. Cooper*, 336 U.S. 77 (1949).

newsracks on public sidewalks,[3] the operation of sound equipment in public parks,[4] or any other activities of special First Amendment significance. But we do submit, and believe it to be a fundamental proposition worthy of this Court's plenary consideration, that familiar First Amendment principles should govern administrative schemes that license the deployment of facilities necessary for electronic speech:

(1) Foremost among these free speech principles is the precept that administrative discretion must be carefully limited. The First Amendment forbids government from "vest[ing] restraining control over the right to speak [in] an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951).[5] Thus, in *City of Lakewood v. Plain Dealer*

---

[3] *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

[4] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[5] *See, e.g., Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402-03 (1992) (striking down assembly and parade ordinance that permitted a government administrator to vary the fee to reflect the estimated cost of maintaining public order, on the ground that there were "no articulated standards either in the ordinance or in the county's established practice"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990) ("a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship'") (quoting *City of Lakewood*, 486 U.S. at 757); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) ("a statute that requires ... a 'license' for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) ("in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals, or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this

Publishing Co., 486 U.S. 750 (1988), the Court held invalid on its face an ordinance that gave a mayor untrammelled power to grant or deny applications for annual permits to place newsracks on public property, even though such newsracks necessarily burden the streets and other public areas with clutter, litter, and other inconveniences. The Court explained that, "[w]ithout ... guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id.* at 758.[6]

In *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), this Court invalidated a city regulation of newsracks on public property that permitted them to be used for distributing newspapers but not commercial handbills. Although the Court accepted that the city was "[m]otivated by its interest in the safety and attractive appearance of its streets and sidewalks," *id.* at 1507, the Court noted that the city's regulatory scheme raised the same concerns as the ordinance struck down in *Lakewood* — in particular, that it did not contain a clear and explicit limit on the scope of the decisionmaker's discretion. 113 S. Ct. at 1513 n.19.

(2) The second salient principle is what this Court has

Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

[6] Even the dissenters agreed that "certain licensing laws that '[g]iv[e] a government official ... substantial power to discriminate based on the content or viewpoint of speech' are unconstitutional on their face — without any showing of actual censorship or discrimination, or even without the potential licensee even making an application for a license." 486 U.S. at 774 (White, J., joined by Stevens and O'Connor, JJ., dissenting) (quoting the majority opinion, 486 U.S. at 759).

described as "[t]he core policy underlying" *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) — "that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990).[7]

Thus, administrative schemes that license the deployment of facilities for video programming and other electronic speech must ensure that decisions are made within "a reasonable period of time." There must be time limits within which the decisionmaker is required to act, and applications must not be allowed to languish for an indefinite period.

(3) Finally, any restriction on facilities needed for electronic speech must, at an absolute minimum, be narrowly tailored to the Government's regulatory objective and must possess a close nexus to the particular facilities that are the object of regulation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837-38 (1987); *Dolan v. Tigard*, No. 93-518 (argued Mar. 23, 1994).

These three First Amendment principles are settled law in the context of the distribution of written materials. This Court should grant *certiorari* to clarify that the principles extend as well to administrative schemes licensing the deployment of facilities necessary for electronic speech.

---

[7] *See also Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 802 (1988) (holding that scheme failing to provide for definite limitations on the time within which administrative agency must act was constitutionally unsound because the "delay compelled the speaker's silence"); *City of Lakewood*, 486 U.S. at 771 ("Nowhere in the ordinance is either [the mayor or the city council] required to act with reasonable dispatch. Rather, an application could languish indefinitely before the Council, with the Newspaper's only judicial remedy being a petition for mandamus"); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (invalidating statute on ground that it restrained speech for an "indefinite duration").

This case is a good vehicle to review that question. Federal law provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). Los Angeles acknowledges that its cable franchising process "is similar in all material respects to the process by which most municipalities and counties across the nation have granted cable franchises." Cross-Petition at 8. Yet, as Preferred Communications explains, there are no guidelines for, or limitations on, the exercise of the vast administrative discretion afforded by the franchise process.

Although the 1992 Cable Act purports to limit the power of cities and localities to grant exclusive franchises, it nonetheless permits them to "refuse to award an additional competitive franchise" unless refusal to do so would be "unreasonable." 47 U.S.C. § 541(a)(1). In addition, federal law grants local officials broad authority to require, as a condition of holding a franchise, that cable operators pay a special franchise fee, in addition to taxes, fees, and other assessments of general applicability, *id.* at § 542(a);[8] "that channel capacity be designated for public, educational, or governmental use, and channel capacity or institutional networks be designated for educational or governmental use," *id.* at § 531(b); and that cable operators comply with

---

[8] The power to tax is of course "the power to destroy," *McCullough v. Maryland*, 4 Wheat. 316, 431 (1819), and this Court has recognized the First Amendment risk posed by laws that are not generally applicable taxes but rather are special assessments singling out cable television for unique burdens. *E.g.*, *Leathers v. Medlock*, 499 U.S. 439 (1991). Moreover, the danger of the authority to levy fees is heightened by decisions such as *Erie Telecommunications, Inc. v. Erie*, 659 F. Supp. 580 (W.D. Pa. 1987). There, the court held that a cable television company was estopped from arguing that the municipality's fees exceeded those allowed by law, on the ground that the company had "accepted" the terms of the agreement. The court rejected the company's argument that it faced a Hobson's choice, since failing to agree to the municipality's terms would have resulted in the loss of the ability to use public rights-of-way, at least while litigation was pending.

"requirements for facilities and equipment" for use by local governments. *Id.* at § 544(b)(1). Moreover, cities and localities "may enforce any requirements contained within the franchise (A) for facilities and equipment, and (B) for broad categories of video programming or other services." *Id.* at § 544(b)(2).[9]

The latitude afforded local franchising authorities, and the absence of *any* meaningful time limits, has politicized the process by which local governments determine what speech their citizens will receive through the nation's most important medium of communication — a result that is anathema under the First Amendment. As one expert has observed, "virtually all franchising decisions are intensely political. . . . [and] generally entail[] subjective judgments that violate the first amendment." Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 870-71 (1983).

More fundamentally, contemporary franchise requirements quite plainly do not satisfy the familiar First Amendment principles for the administrative regulation of

---

[9] Lower court decisions illustrate the risk of subtle content discrimination that may be hard to detect but is real nonetheless and worthy of First Amendment concern. For example, in *Chicago Cable Communications v. Chicago Cable Comm'n*, 678 F. Supp. 734 (N.D. Ill. 1988), the district court held that a local cable television commission did not violate 47 U.S.C. § 544 by fining a cable operator for failing to comply with franchise requirements for local origination programming, which demanded that the operator broadcast a certain number of hours of programming per week developed specifically for viewers in Chicago. On appeal, the Seventh Circuit sustained the local origination requirement against a First Amendment challenge. 879 F.2d 1540 (7th Cir. 1989). The court of appeals noted that this Court "has yet to determine the applicable standard of review of a challenge to a municipal regulation of cable television." *Id.* at 1548. Nonetheless, the court of appeals upheld the local origination rule under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), concluding that "it is within the City's rights, arguably its responsibilities, to proffer some requirements guaranteeing that the cable customers are, to the extent possible, accorded a range of programming from the franchisee." 879 F.2d at 1550.

speech. For example, a municipality could not permissibly license bookstores, newspapers, or magazines in the interest of public convenience and necessity.[10] A city could not constitutionally mandate, as a condition of a newspaper's operation within city limits, that the newspaper turn over a portion of its front page for use by the city officials, or that the newspaper deliver each week self-serving bulletins from the city's mayor to the newspaper's readers. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

Yet cable companies are routinely required, as a condition of their franchises, to finance the construction of municipally controlled television studios, to deliver free production equipment to city officials and institutions, and to give city officials absolute programming control over certain channels.[11] In addition, the "franchise fees" that cable operators are required to pay almost never bear any relation to the costs they might impose on public streets and rights-of-way. This sharp departure from settled principles of free speech reflects an unexplained, and disturbing, leap in First Amendment logic and merits this Court's plenary review.

---

[10] The history of the licensing of written expression only highlights the need not to make the same mistake with respect to electronic speech. Shortly after mechanical printing arrived in England, Henry VIII sought to suppress it, fearing its persuasive power, and in 1530 established a licensing system for printers. For the next century, at least, the system of licensing with its monopoly rents gave the Crown considerable power to promote the circulation of works favorable to his religious and political policies and kept the press in England under the control of the monarch. *See* J. Emord, *Freedom, Technology, and the First Amendment* 26 (1991); F. Siebert, *Freedom of the Press in England: 1476-1776*, at 46 (1965); L. Levy, *Emergence of a Free Press* 12-13 (1985).

[11] *See, e.g.*, Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 Catholic L. Rev. 671, 672 (1986) ("The list of such obligations goes on, reflecting the remarkable ingenuity of cities and their consultants in devising schemes for pet 'public interest' projects out of cable companies' and subscribers' money").

The question is all the more important because municipal cable franchise rules provide only one example of the administrative schemes that regulate the distribution of electronic speech. The Federal Communications Commission (FCC), for instance, asserts authority under the Communications Act to regulate the deployment of facilities used to deliver video speech by requiring telephone companies to obtain certificates of "public convenience and necessity." 47 U.S.C. § 214. The Act delegates to the Commission sweeping discretion to grant or deny such certificates or to impose essentially any "terms and conditions as in its judgment the public convenience and necessity may require." *Id.* at § 214(c).

Similarly, direct broadcast satellite services — which can transmit hundreds of channels of video speech to viewers — must obtain government licenses pursuant to 47 U.S.C. § 301. Yet the only "standard" governing the review of an application is "whether the public interest, convenience, and necessity will be served by the granting of such application." *Id.* at § 309(a).

The breadth of the administrative control currently exercised over the means of distributing electronic speech emphasizes the need to clarify the requirements imposed by the First Amendment on administrative schemes regulating such expression.

II. THIS CASE ALSO PROVIDES A VALUABLE OPPORTUNITY TO DECIDE WHETHER THE FIRST AMENDMENT PERMITS MUNICIPALITIES TO SILENCE SPEECH AND REDUCE COMPETITION BY GRANTING EXCLUSIVE CABLE FRANCHISES

In its cross-petition, the City of Los Angeles asserts that a municipality may deny would-be speakers the opportunity to compete with the incumbent cable company by refusing to grant needed franchises. We respectfully submit that the City is wrong, but we wholeheartedly agree with Los Angeles that

the issue is an important one worthy of this Court's review.

First, although the more recent and better-reasoned decisions have concluded that the First Amendment precludes municipal bans on additional competitive franchises, the lower courts are nonetheless divided over the matter. We agree with the City of Los Angeles that this Court's review is urgently needed.

Several courts have agreed with the Ninth Circuit below that "'allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region' exacts too heavy a toll on the First Amendment interests at stake here. Competition in the marketplace of ideas — as in every other market — leads to a far greater diversity of viewpoints (and better service) than if a single vendor is granted a crown monopoly." A60-61 (quoting *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985) (*Preferred I*), *aff'd on narrower grounds*, 476 U.S. 488 (1986)).[12] Other

---

[12] *See Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 637 (M.D. Ga. 1991) (invalidating exclusive franchise on First Amendment grounds; explaining that "cable television is entitled to the same first amendment protection as newspapers"; and holding that, while "[c]oncerns about disruptions of the public domain do allow a government to make reasonable restrictions on the time, place, and manner of the disruptions," a second provider could not be excluded automatically), *remanded on other grounds*, 992 F.2d 1178 (11th Cir. 1993); *Jones Intercable of San Diego, Inc. v. City of Lake Elsinore*, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991) (ordering city to issue competing cable company a franchise license, explaining that "[p]laintiff is a First Amendment 'speaker,' entitled to a high degree of constitutional protection," and that "[a]lthough the city has suggested that there will be physical disruption of the public domain, there is insufficient showing to suggest that plaintiff's franchise should be totally denied for this reason. Reasonable time, place, and manner restrictions, together with appropriate bond and insurance requirements, can remedy this potential harm"); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 966-67 (N.D. Cal. 1987) (holding that First Amendment did permit city to adopt measures to minimize disruption to public streets, but that First Amendment precluded city from adopting regulation providing only for a single cable television

courts have disagreed.[13]

Second, this Court should grant review because of the importance of the First Amendment rights at issue. For better or worse, electronic speech, particularly in the form of video programming, is the principal means by which most Americans receive news, political opinion, entertainment, and other forms of information. More households have televisions than subscribe to newspapers.[14] The average television household watches television seven hours per day, whereas the average newspaper receives only 45 minutes of attention.[15]

---

operator); *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (noting that "the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights" (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1112-13 (D. Utah 1985) (rejecting application of broadcast precedents like *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), to cable television), *aff'd*, 800 F.2d 989 (10th Cir. 1986) (*per curiam*), *aff'd*, 480 U.S. 926 (1987).

[13] For example, in *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1378-79 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), the Tenth Circuit vacated an injunction issued against a city's exclusive franchise policy. And in *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982), the Seventh Circuit upheld the denial of a preliminary injunction sought by a competing cable company against a city's exclusive franchise policy.

[14] According to the Census Bureau, 92 million households (or 98 percent of all households) have a television, in contrast to a total daily newspaper circulation of 62 million. Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States 1992*, Table 884 (112th ed. 1992).

[15] Office of Plans and Policies, Federal Communications Comm'n, *Broadcast Television In a Multichannel Marketplace*, OPP Working Paper No. 26, at 19, 107 (June 1990); Newspaper Ass'n of America, *Facts About Newspapers '92*, at 25 (1992).

In addition, the "'power to communicate ideas through sound and visual images ... is significantly different from traditional avenues of communication because of the immediacy of the medium.'" *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987).

Thus, the First Amendment question here is not some academic nicety. It is the very real question of whether a multitude of willing speakers — and tens of millions of potential viewers — will be prevented from fully participating in the most important medium of communication today. In enacting the 1992 Cable Act, Congress extensively documented the harms to the system of free expression caused by restrictive franchising practices and the lack of competition in cable markets.[16] Congress limited, but did not forbid, exclusive franchises, *see* pp. 8-9, *supra*, and the 1992 Cable Act did not solve the problem — as illustrated quite concretely in the instant case by Preferred Communications' inability to secure even the *opportunity to seek* a needed franchise in Los Angeles without the intervention of the Ninth Circuit. The net result of restrictive franchising practices, in all their guises, is that the market for speech is distorted, prices are too high, and the introduction of new services is discouraged.[17]

---

[16] Of the more than 10,000 communities served by cable in 1991, only 53 had two cable systems competing head-to-head. In the 1992 Cable Act, Congress specifically found that cable has become the "dominant national video medium" and that most cable operators "face[] no local competition," resulting in "undue market power for the cable operator as compared to that of consumers and video programmers." § 2(a)(2), 106 Stat. 1460. As a result, according to Congress, cable rates have increased at three times the rate of inflation since 1986. § 2(a)(1), 106 Stat. 1460.

[17] For example, the FCC has estimated that introducing competition from telephone companies "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide. Report of the Federal Communications

Third, this Court should grant review because the City's justifications for its franchise system plainly cannot pass muster under the "narrow tailoring" requirement of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).[18] Los Angeles contends that competing franchises must be denied to conserve pole and conduit space. But the City conceded below that the public utility infrastructure in Los Angeles could accommodate at least one additional cable system. *See* A60, A62.

Moreover, it is obvious that the District Court, *see* A90, and the Ninth Circuit on two occasions, *see* A25, A27-A28, A60-A61, A63 n.5, both correctly found that the City's franchise requirements are not narrowly tailored to its asserted interests. Poles and conduit are owned not by cities, but by telephone companies, electric utilities, and others,[19] under

---

Commission Regarding the President's Regulatory Reform Program 16 (April 28, 1992).

[18] The narrow tailoring test requires that a law not "burden substantially more speech than is necessary" to prevent the harms identified by the Government. *Ward*, 491 U.S. at 800. This Court has made clear that, under the First Amendment, the Government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). This burden is not satisfied by "speculation or conjecture" or even by weak evidence. *Id.* The law must serve the interest in a "direct and effective" way. *Ward*, 491 U.S. at 800. If the restriction lacks a "close and substantial relation to the governmental interests asserted," it cannot survive intermediate scrutiny. *Edenfield*, 113 S. Ct. at 1802.

[19] Los Angeles claims that permitting a second cable company to lease poles and conduit would effect "a Fifth Amendment taking of that property." Cross-Petition at 15. Los Angeles also argues that the poles and conduit represent "nonpublic forums." *Id.* at 17-19. Both of these arguments assume that the *city* owns utility poles and conduit. But the properties are in fact *privately* owned by telephone companies and utilities. *See Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22-

terms regulated by the Pole Attachment Act of 1978, 47 U.S.C. § 224.[20]

For example, long distance telephone companies, like AT&T, MCI, and Sprint, lease large quantities of pole and conduit space from Bell Atlantic. So do ordinary businesses, like retail chains that desire dedicated lines from one store to another. Yet no municipal franchise is required to engage in these activities. In fact, cable operators are the only potential lessees of pole and conduit space who must secure a franchise — a dramatically ill-fitting requirement if the franchise rules are truly intended to conserve supposedly scarce pole and conduit space.[21]

Indeed, municipal governments are significant lessees of

---

23 n.1 (1986) (Marshall, J., concurring in the judgment); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534 n.1 (1980). In addition, the Ninth Circuit explained below that, under California law, public forum analysis does not help the City's argument. A21-A28.

[20] Preferred Communications' reference to pole attachment as a "common carrier service" (Pet. at i) is a misdescription. Although regulated to some extent by the 1978 Act, pole attachments are provided pursuant to private contracts and are not "services" as that term is used in public utility law. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 & n.6 (1987); *cf. Southwestern Bell Tel. Co. v. FCC*, Nos. 91-1416, *et al.* (D.C. Cir. Apr. 5, 1994) (indicating that provision of "dark fiber" — *i.e.*, provision of fiber optic lines without the necessary electronic equipment to power the fiber — is not a common carrier service but could be made available on a contractual rather than a common carrier basis).

[21] The fact that cable operators are singled out for the special burden of a franchise requirement constitutes a form of speaker-specific discrimination, which this Court has properly held triggers strict scrutiny under the First Amendment and equal protection principles. *See Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (*per curiam*) (government may not "discriminate among speakers or ideas"); *Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue"); *see also Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

pole and conduit space, as they increasingly provide cable service of their own in competition with incumbent cable companies — a trend that has been both approved by the courts[22] and encouraged by Congress in the 1992 Cable Act, which exempted local governments from having to comply with their own franchise requirements.[23] All of this would be rather curious if cities truly were, as Los Angeles says, vitally concerned with "conserv[ing]" pole and conduit space for "future uses," Cross-Petition at 14, and if franchises were the means by which municipalities achieved that end.

Therefore, Los Angeles cannot satisfy its burden under the First Amendment of justifying its franchise restrictions. But we fully agree with the City's position that this Court should accept *certiorari* and resolve the issue once and for all.

---

[22] *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 637-40 (11th Cir. 1990); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314-15 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 430 (1991).

[23] *See* § 7(c) of the 1992 Cable Act, 106 Stat. 1483, codified at 47 U.S.C. § 541(f).

CONCLUSION

This Court should grant Preferred Communications' petition for *certiorari* as well as the cross-petition filed by the City of Los Angeles.

Respectfully submitted,

MARY McDERMOTT
900 19th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 326-7247
Counsel for United States Telephone Association

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JAMES R. YOUNG
JOHN THORNE
MICHAEL E. GLOVER
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-0895
Counsel for Bell Atlantic Corp.

May 18, 1994